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NO. 08-50

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

REPLY IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an individual who submits an application to engage in a First Amendment protected activity may challenge the licensing scheme as an invalid prior restraint if the application in question is denied based on unrelated grounds.

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I. THE SUBMISSION OF AN APPLICATION SHOULD NOT DEPRIVE THE APPLICANT OF STANDING TO CHALLENGE A LICENSING SCHEME.

To its credit, the City of Roswell does not dispute the fact that this Court has long found that a litigant that is subject to an ordinance has standing to challenge that ordinance on the basis that it constitutes a prior restraint on speech irrespective of whether that litigant has applied for a permit or license under the ordinance in question. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988); *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277, 282 (1958). Instead, the City attempts to argue – without coming out and directly stating as much – that if a party takes the affirmative step of submitting an application for the required permit, then they can no longer challenge the constitutionality of the permitting scheme, but rather can only attack the provisions of the code that a municipality relies upon to deny the application. Of course, the City has no direct support for this argument, but it nevertheless attempts to argue that the case law relied upon by Granite State is distinguishable.

A close examination of the City's argument, however, reveals that the case law relied upon by Granite State, such as *Lakewood*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992), and *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004), is not distinguishable at all, but only confirms that this Court has found that an applicant such as Granite

State has standing to challenge a prior restraint of First Amendment protected activity.

Further examples of this established precedent can be seen through this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990). In *FW/PBS*, this Court considered a litigant's challenge to an adult entertainment ordinance. Before the trial court, the plaintiffs challenged the constitutionality of a new ordinance that rendered their existing stores nonconforming and required that they be closed within three years. *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1067 (N.D. Tex. 1986). Even though the existing businesses already had licenses, the lower court permitted them to challenge the licensing scheme of the new ordinance, holding "[i]t is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Id.* After the bulk of the ordinance was upheld, including the licensing scheme, the plaintiffs appealed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). On appeal, the Fifth Circuit found that the licensing scheme used by the city satisfied constitutional standards. *Id.* at 1301-04.

On appeal to this Court, the petitioners were afforded standing to challenge the licensing scheme. 493 U.S. at 223-30, 110 S. Ct. at 603-07. After finding that the plaintiffs had standing, this Court held that the licensing scheme was unconstitutional because it lacked the necessary procedural safeguards. *Id.* Even though the continued operation of the adult establishments was expressly prohibited, this Court permitted the petitioners to challenge the licensing scheme. *Id.* Thus, this Court

recognized the litigants' ability to facially challenge the permitting scheme of the new ordinance even though they already held business licenses.

Given the fact that the plaintiffs in *FW/PBS*, who already had permits, were afforded standing to challenge the licensing scheme, the fact that Granite State submitted a permit application should not have disqualified Granite State from having standing to challenge Roswell's licensing scheme. Thus, *FW/PBS* shows that Granite State should have been afforded standing to challenge the permitting provisions of the Roswell sign code.

The City's primary method of distinguishing the case law relied upon by Granite State is to assert that the ordinances at issue in those cases clearly proscribed the conduct that was at issue, whereas Roswell's permitting scheme somehow did not proscribe Granite State's proposed signs. *See* Response in Opposition, pp. 11-12, 14-15. This contention could not be further from the truth. Section 22.2 of the Roswell sign code unequivocally required prior approval from a zoning official through the issuance of a permit before any signs could be posted. Furthermore, Section 22.17(a) established a presumption that all signs were prohibited unless expressly allowed. Thus, Granite State's only options were to submit a permit application or to erect the sign without first obtaining a permit, thereby risking prosecution. Clearly Granite State's proposed conduct was proscribed by the permit requirement.

These same substantive facts were present in *Forsyth County v. Nationalist Movement*. According to Respondent, this Court found the litigant had standing there, "because the plaintiff could not hold

the demonstration without paying the permit fee or risking prosecution, there was an actual injury suffered as a result of the challenged ordinance provision." *See* Response in Opposition, p. 14. As shown above, Granite State was in the same position with respect to its proposed signs, yet the City attempts to argue Granite State does not have standing in this instance. There is simply no explanation for the inconsistency between the approach taken by this Court and the recent holding of the Georgia Supreme Court based on federal court authorities.

The City's attempt to distinguish *Lakewood* on similar grounds meets the same fate. There, the newspaper was faced with an ordinance that required a permit before engaging in protected conduct. If a permit was not obtained in advance, the publisher would face prosecution. 486 U.S. at 755-56, 108 S. Ct. at 2143. Given that Granite State was faced with this same scenario, it should have been afforded standing to challenge the permitting scheme found within the Roswell sign code. The fact that Granite State had the initiative to actually submit an application for consideration should not deprive it of the ability to challenge a constitutionally suspect licensing scheme.

Equally as unpersuasive is the City's attempt to distinguish *Littleton* on similar grounds. *See* Response in Opposition, pp. 15-16. In *Littleton*, this Court addressed the constitutionality of an adult business ordinance. 541 U.S. at 776-77, 124 S. Ct. at 2221-22. The respondent in *Littleton* had opened up an adult bookstore in a location where the city expressly prohibited such a business. 541 U.S. at 777, 124 S. Ct. at 2222. Even though the bookstore

was banned in that location, the Tenth Circuit found that the respondent had standing to challenge the licensing provisions of the ordinance. 311 F. 3d at 1226-27. After the Tenth Circuit found the permitting requirements facially unconstitutional, the city appealed to this Court. 541 U.S. at 778, 124 S. Ct. at 2222.

Although this Court reversed the decision of the Tenth Circuit and found that the ordinance did indeed provide for a prompt judicial determination, in doing so the Court afforded standing to facially challenge the judicial review provisions even though the plaintiff never applied for a permit nor sought judicial review of the citation. 541 U.S. at 777-78, 782-84, 124 S. Ct. at 2222, 2225-26. Under Roswell's logic, the only provision of the Littleton ordinance that could have been challenged would have been the subsections that rendered the adult store illegal. Instead, this Court had no issue with the litigant's standing to challenge the licensing scheme. Thus, *Littleton* makes clear that plaintiffs who suffer any harm under a regulation can facially challenge *invalid procedural provisions* that are alleged to be overbroad.

Furthermore, as this Court noted in *Littleton*, "'[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" 541 U.S. at 780, 124 S. Ct. at 2224. Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.*

Signs are, of course, an expressive activity protected by the First Amendment. As this Court established in *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981), "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *See also City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994). As this Court's decisions in *Ladue* and *Metromedia* illustrate, communicating via signs and billboards is protected by the First Amendment. Thus, the City's veiled attempts to suggest that cases involving adult businesses do not apply in this context are baseless.

This Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002), further illustrates that a litigant has standing to facially challenge a prior restraint on First Amendment protected activity. In *Ashcroft*, this Court considered a facial challenge to the Child Pornography Prevention Act. *Id.* at 244, 122 S. Ct. at 1398. None of the plaintiffs had been cited under the Act or even threatened with prosecution. Nevertheless, the majority had no qualms affording the plaintiffs facial overbreadth standing. Indeed, because the plaintiffs were challenging a speech restriction they were afforded overbreadth standing and were not limited to a challenge of portions of the law that had directly injured them. The Court held:

> this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any

> capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression.

535 U.S. at 244, 122 S. Ct. at 1398-99. In *Free Speech Coalition*, the Court was forced to weigh the "possible harm to society in permitting some unprotected speech to go unpunished" versus "the possibility that protected speech of others may be muted." *Id.* at 255, 122 S. Ct. at 1399. The Court cited the overbreadth doctrine as "prohibit[ing] the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* As such, overbreadth was used to strike statutory provisions without any analysis of whether they could directly have been enforced against the plaintiffs. In light of the latitude that this Court has afforded litigants who take on regulations that impact a substantial amount of protected speech, the Georgia Supreme Court's decision undermining this important facet of First Amendment jurisprudence should be addressed by this Court.

CONCLUSION

In order to engage in the First Amendment protected activity of posting signs in the City of Roswell, Granite State was faced with the options of

subjecting itself to a discretionary permitting scheme or installing a sign and facing prosecution for failure to obtain the required permit. This Court has previously afforded litigants standing to challenge permitting schemes under these circumstances. The fact that Granite State decided to submit a sign application should not change the standing analysis. Indeed, no precedent from this Court has ever established that submitting an application deprives the applicant of standing to challenge a licensing scheme. Yet this is the approach that the Georgia Supreme Court has now adopted based on the First Amendment and federal court decisions.

The Georgia Supreme Court's approach unduly threatens speech activity in Georgia and elsewhere. Therefore, Granite State respectfully requests that its Petition for Writ of Certiorari be GRANTED.

DATED this 4th day of September, 2008.

Respectfully submitted,

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